Dissenting Views to H.R. 339, the "Personal Responsibility in Food Consumption Act of 2003"

We oppose H.R. 339 for several reasons. First and foremost, the bill is drafted so broadly, it would immunize defendants for negligent and reckless behavior, including mislabeling of food products. We also object to the fact that the legislation applies retroactively, and is written for the benefit of a single special interest – the fast food industry. Third, we believe the legislation constitutes an unwarranted and hastily considered affront to our system of federalism. Finally, we oppose the bill because there are far preferable ways to respond to this issue than by rushing to judgment to pass a one-size-fits-all federal law preempting all 50 states. H.R. 339 is opposed by several organizations including Consumers Union[1], Public Citizen[2], Alliance for Justice[3] and the National Conference of State Legislators. For these and the reasons set forth herein, we dissent.

Background and Description of Legislation

In August 2002, two children brought suit in New York, claiming that McDonald's bore legal responsibility for their obesity and health problems. The deluge of media reports that followed were often critical of the case. In January 2003, Judge Robert Sweet dismissed the action, but granted plaintiffs the right to replead their negligence claims with greater specificity.[4] When the plaintiffs failed to do so in September, 2003, the case was dismissed. H.R. 339 is an apparent response to that dismissed case.

H.R. 339 prohibits an otherwise harmed "person" from bringing a "qualified civil liability action in state or federal court."[5] A qualified civil liability action is defined as any action under law or equity brought against a food manufacturer, seller or trade association claiming an injury from a person's consumption of food resulting in weight gain, obesity or other weight-related

[1]Letter from Sally Greenberg, Senior Product Safety Counsel and Mister Phillips, Esther Peterson Fellow, Consumers Union (February 23, 2004)(on file with the Democratic staff of the House Judiciary Committee).

[2]Letter from Frank Clemente, Director, and Jackson Williams, Legislative Counsel, Public Citizen Congress Watch (February 23, 2004)(on file with the Democratic staff of the House Judiciary Committee).

[3]Letter from Nan Aron, President, Alliance for Justice, (February 23, 2004) (on file with the Democratic staff of the House Judiciary Committee).

[4] *See* Pelman v. McDonald's Corp., 237 F.Supp.2d 512, 533 (S.D.N.Y. 2003) ("As long as a consumer exercises free choice with appropriate knowledge, liability for negligence will not attach to a manufacturer. It is only when that free choice becomes but a chimera–for instance, by the masking of information necessary to make the choice, such as the knowledge that eating McDonald's with a certain frequency would irrefragably cause harm–that manufacturers should be held accountable.")

[5]H.R. 339, 107th Cong. §4, part 5 (2003).

health condition.[6] The ban would supercede state law in all 50 states.[7] The ban operates retroactively, terminating any and all pending litigation at the time of passage.[8] The bill appears to be written in a one-way preemptive manner, so that it supercedes any state law which is not more favorable to defendants than H.R. 339.

H.R. 339 creates three narrow exceptions where a weight-related action would be permitted: (1) in regards to the sale of an adulterated product, (2) in an action for breach of express contract or express warranty, and (3) when the respondent "knowingly and willfully" violates a State or Federal law and that violation is the proximate cause of the weight-related injury.[9] If an action is brought under this final exception, the plaintiff is further required to plead "with particularity" which law has been violated and the facts arising thereto.[10]

I. HR. 339 Would Permit Negligent and Reckless Actions by Food Producers

H.R. 339 is drafted so broadly that it bars lawsuits that would hold food producers accountable for their negligent and reckless actions – even those that violate state and federal law.[11] This leaves two critical loopholes in the law – first, if a defendant commits simple negligence or recklessness which is not otherwise prohibited by statute; and second, if a defendant actually violates a Federal or State law (such as a labeling requirement), but does not do so intentionally. By requiring an intent to violate the law, H.R. 339 holds the food industry to a lower standard of conduct than other industries, and indeed, to a lower standard of conduct expected of the average person.[12]

It is not difficult at all to conceive of situations where a food company permits incorrect ingredient or fat content information to appear on its product, thereby contributing to a range of dangerous conditions -- from obesity, to heart attacks or even worse. This is not a mere

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[6] *Id.* at § 4, part 5.

[7] *Id.* at § 3(a).

[8] *Id.* at § 3 (b). While a motion to dismiss is pending, discovery is stayed unless doing so would jeopardize evidence or work an undue prejudice on a party. During the stay, all evidence must be must be preserved as if it were subject to continuing request for production. *See* § 3(c).

[9] *Id.* at § 4, part 5.

[10] *Id.* at § 3(d).

[11] While the bill permits legal actions when the defendant has violated a State or Federal law, the bill permits permitted lawsuits to situations where the law is broken "knowingly and willfully." §4, part 5(A).

[12] To mitigate this problem, Representative Scott offered an amendment to strike "knowingly and willingly" from Section 4, part 5(A). Had the amendment passed, a suit would still be allowed only when a law or regulation was broken, but would include those instances where the law was broken because of a food company's negligent or reckless behavior. Unfortunately, the amendment was defeated.

hypothetical concern, as two recent incidents exemplify how these sorts of misconduct by food companies would be sanctioned by this bill.

In 2001, a consumer reporter investigated the calorie and fat content of DeConna Ice Cream Company's Big Daddy Reduced Fat Ice Cream and found that the ice cream had three times more fat and calories than the label claimed.[13] After the mistake became public, two dieters filed a class action suit[14] under Florida's Unfair Trade and Deceptive Practices Act, asserting they were misled by the label's promises.[15] This past September, DeConna settled the case.[16] In addition to being prohibited from using misleading labeling, the company agreed to periodically verify the accuracy of its labeling information.[17] Rather than receive a financial windfall, the plaintiffs were merely reimbursed for the money they had expended. Had H.R. 339 been law in 2001, the action would likely have been barred under the bill.

H.R. 339 would have also prevented possible private litigation relating to KFC's recent and much criticized advertising campaign. This past fall KFC began advertising its fried chicken as part of a healthy diet. Claiming that fried chicken contributed to "eating better" and helped dieters watch their carbohydrate intake, KFC intimated that eating its chicken was part of a successful weight loss plan.[18] While the ads did display minuscule disclaimers in fine print, viewers were given the distinct impression that eating fried chicken could help them lose weight. After harsh criticism by the advertising industry, some of whom claimed the ads knocked the "credibility not just of KFC but of the entire marketing industry,"[19] the ads were pulled. In response to the ads, the Center for Science in the Public Interest filed a complaint with the Federal Trade Commission seeking an investigation into deceptive advertising practices.[20] Again, had

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[13]Mitch Lipka, *Inside Scoop: Ice Cream Far From Dieter's Dream*, SOUTH FLORIDA SUN-SENTINEL, June 17, 2001.

[14]Cohen v. DeConnna Ice Cream Co., No. 01-010780, (Fla. Cir. Ct., Broward Cty., Dec. 20, 2001) (granting class action status).

[15]FLA. STAT. ANN. §501.200 et. seq. (West 2003).

[16]Patrick Danner, *Fat Chance; A $1.2 Million Settlement in a Class-Action Suit Against Big Daddy Will be Paid Mostly in Ice Cream, Food Labeling*, THE MIAMI HERALD, Sept. 27, 2003.

[17]*Id.*

[18]Press Release, Center for Science in the Public Interest, KFC Ad Draws Fire From CSPI (Nov. 7, 2003), http://www.cspinet.org/new/200311073.html.

[19]*KFC Blunder in "Health Ads*," ADVERTISING AGE, Nov. 3, 2003, at 22 (editorial noting that "KFC last week introduced an ad campaign that is as laughable, and damaging, as any we can imagine or recall, and it should be pulled off the air immediately. In the long history of absurd, misleading and ludicrous ad claims, the campaign's position of KFC's breaded, fried chicken as a pat of a healthy diet merits special derision.").

[20]*Id*. The FTC has not confirmed whether or not it will be investigating KFC's advertisements.

H.R. 339 been law, it is unlikely any form of private litigation against KFC would have been viable.

Compounding the difficulty in bringing a legal action where a food company has harmed consumers by violating a statutory requirement, the bill requires that any allegations in this regard be pleaded with particularity.[21] As Representative Mel Watt stated during the markup debate when he unsuccessfully sought to delete this heightened pleading requirement, "the imposition of a particularity requirement on the narrow category of actions permitted under the bill is unduly harsh and unnecessary." It would be far preferable if the Committee would continue to leave the development of pleading requirements with the Judiciary, which is free to alter such provisions through the Rules Enabling Act procedure promulgated by Congress.[22]

II. H.R. 339 is Unfairly Retroactive and Applies to a Single Special Interest Group

We also object to the retroactive and unfair nature of the legislation. First we believe, as a matter of equity, it is unfair to change the rules of litigation in the middle of the game. If an individual or corporation brings a lawsuit based on a particular set of laws and principles, it is simply unfair to alter those rules and principles after the fact. In addition to suffering a harm, the plaintiff may have expended significant time and resources in the litigation, and it is inequitable for Congress to unilaterally dismiss that claim without providing the harmed party with his or her day in court.

Second, it is inappropriate for the Majority to deny harmed parties their rights in the complete absence of any evidence that the courts are not processing the cases before them in a just and equitable manner. Indeed the evidence we have seen on this count is precisely to the contrary.[23] Similarly, it is inadvisable for the Committee to take such an extraordinary action without conducting any analysis whatsoever of the number or nature of cases currently pending in court.

Third, retroactive application of changes in the law flies not only in the face of fairness, but precedent as well. We would note that the following recent liability legislation enacted into law were not drafted to apply retroactively: the General Aviation Revitalization Act of 1994[24] (statute of limitations on suits against airline manufacturers); the Bill Emerson Good Samaritan

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[21] H.R. 339 § 3(d).

[22] The Rules Enabling Act, 28 USC 2072, (1948) allows the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district Courts and courts of appeals.

[23] *See infra* Section IV and accompanying footnotes.

[24] Pub. L. No. 103-298, 108 Stat. 1552 (1994).

Food Donation Act[25] (limits the liability of those who donate food to a charity); the Volunteer Protection Act of 1997[26] (limits the liability of volunteers); Section 161 of the Amtrak Reform and Accountability Act of 1997[27] (limits punitive damages in railroad accidents); the Biomaterials Access Assurance Act of 1998[28] (limits the liability of suppliers of raw materials and medical implant components); the Year 2000 Readiness and Responsibility Act [29] (limits the liability of Y2K defendants); and Terrorism Risk Insurance Act of 2002 [30] (limits liability in terrorism-related cases). Of particular note, when the Committee considered the Volunteer Protection Act in the 105th Congress, we voted on a bipartisan basis–22 to 4–in favor of a Scott amendment limiting the bill's limitations to harm which occurred after the bill was passed into law.[31] Ironically, on the very same day H.R. 339 was ordered reported, the Committee voted to repeal the Antidumping Act of 1916, and in doing so had taken specific care to make sure that law would not apply retroactively.[32]

We also believe it is inadvisable for the Committee to be picking and choosing between industries in granting special legal liability status. Legislation of this nature leads to a patchwork system where the ability of consumers to seek relief varies depending upon the relative legislative clout of the affected industry, hardly a desirable policy outcome. This is why, among other reasons, the legislation is opposed by the Physicians Committee for Responsible Medicine and the Center for Science in the Public Interest, which has written:

> Frivolous lawsuits deserve to be thrown out of court, and frivolous legislation should be thrown out of Congress—and [H.R. 339] is nothing but frivolous. [The proponents] simply want to preemptively take an entire industry off the hook, and make restaurants and food companies a special, protected class—immune from the scrutiny of judges or juries. [33]

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[25]Pub. L. No. 104-210, 110 Stat. 3011 (1996).

[26]Pub. L. No. 105-19, 111 Stat. 218 (1997).

[27]Pub. L. No. 105-134, 111 Stat. 788 (1997).

[28]Pub. L. No. 105-230, 112 Stat. 1519 (1998).

[29]Pub. L. No. 106-37, 106 Stat. 185 (1999).

[30]Pub. L. No. 107-297, 116 Stat. 2322 (2002).

[31]H.R. REP NO. 105-11 (1997).

[32]Although Rep. Thomas introduced H.R. 3557, an anti-dumping repeal bill, in the 107th Congress, H.R. 1073, 108th Cong. (2003), ultimately proceeded because it did not contain a retroactive provision.

[33]Press Release, Center for Science in the Public Interest, Keller Bill Promotes Corporate Irresponsibility (June 19, 2003) *available at* http://www.cspinet.org/new/200306192.html; Press Release, Physicians Committee for Responsible Medicine, Health Advocates Condemn Proposed bill to Shield Junk Food Industry (June 16, 2003)

When Mr. Watt offered an amendment seeking to delete the retroactivity provision,[34] the Majority responded by merely pointing to the fact that H.R. 1036, the gun liability bill, was retroactive and applied to a single industry. However, that effort has merely passed the House, it has not as of yet been considered by the Senate, let alone been enacted into law. Moreover, the fact that a single powerful lobby was able to achieve retroactive applicability on a single occasion hardly serves as a justification to abrogate the ordinary rules of fairness.

III. H.R. 339 Constitutes an Affront to our System of Federalism

As we have stated on numerous previous occasions, principles of federalism dictate that in all but the most exceptional cases, tort law should be left to the states. Tort law has traditionally been handled by the state legislative and court systems under a framework established by our founders. Indeed, the Committee has received no evidence that the state court legal system is not functioning well and fairly with regard to food liability cases. State courts have dismissed those matters involving food consumption which were non-meritorious.[35] At the same time, Louisiana has enacted a statute limiting obesity lawsuits,[36] while several other states – including Wisconsin, Colorado, and Illinois -- are considering similar laws.[37] As Representative Watt stated during the Judiciary Committee markup, ". . . it is a terrible idea for us to federalize this issue completely and do harm to the whole system that we give so much lip service to of respecting the rights of States."[38]

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available at http://www.pcrm.org/new/health030616.html.

[34]The Watt Amendment was defeated by a voice vote.

[35]*See infra* Section IV.

[36]2003 La. Act 158 states "any manufacturer, distributor or seller of a food or non-alcoholic beverage intended for human consumption shall not be subject to civil liability for personal injury or wrongful death where liability is premised upon an individual's weight gain, obesity or a health condition related to weight gain or obesity and resulting from his long term consumption of a food or non-alcoholic beverage." The effective date of the law is June 2, 2003.

[37]*See* A.B. 595, 96th Leg., Reg. Sess. (Wi. 2003) (referred to the Senate Committee of the Judiciary); Common Sense Consumption Act, H.B. 1150, 64th Gen. Assem., Reg. Sess. (Co. 2004) (passed the House on January 30, 2004, and has been introduced in the Senate and assigned to the Judiciary Committee); Limited Liability in Civil Actions for Obesity, S.B. 020, 64th Gen. Assem, Reg. Sess. (Co. 2004) (passed the Senate 33-2 on January 23, 2004 and has been introduced in the House and assigned to the Judiciary Committee); Common Sense Consumption Act, H.B. 3891, 93rd Gen. Assem., Reg. Sess., (Ill. 2004) (referred to the House Committee on Rules); Common Sense Consumption Act, S.B. 2813, 93rd Gen. Assem. Sess., (Ill. 2004) (referred to the Senate Committee on Rules).

[38]Representative Watt offered an amendment to limit the bill's applicability to Federal courts. It was defeated by a party line vote of 11-15.

It is with good reason the federal government has traditionally deferred to the states regarding tort law. The Conference of State Chief Justices has testified that the search for uniformity through federal liability legislation will ultimately prove counterproductive:

> It follows that Federal standards, however well articulated, will be applied in many different contexts and inevitably will be interpreted and implemented differently, not only by the State courts but also by the Federal courts . . . Moreover, State Supreme Courts will no longer be, as they are today, the final arbiters of their tort law . . . a legal ticket is inevitable and the burden of untangling it, if it can be untangled at all, will lie only with the Supreme Court of the United States, a court which many experts feel is not only overburdened but also incapable of maintaining adequate uniformity in existing Federal law.[39]

The National Conference on State Legislatures has also decried "one-size-fits-all federal solution on the States," and noted in other contexts that federalizing tort law would lead to greater confusion rather than certainty:

> [m]ore likely than "predictability" is the prospect that this massive nationalization of civil law will cause years of uncertainty, unpredictability and an increasing flow [of] litigation to the Supreme Court. It is time to set aside old assumptions about the wisdom of Congress and the Supreme Court dictating domestic policy in the states. Federalism offers accountability, innovation and responsiveness in the formulation of public policy. The era of federal paternalism is over.[40]

In many respects, H.R. 339 is even less justified than the other types of liability legislation previously considered by this Committee because it is so premature. By acting before there is even a single jury verdict, this Committee also departs from its long tradition of letting courts decide new cases before considering stepping in to alter the law where it believes the results are contrary to the public interest. By doing this, Congress never receives the benefit of considering the various fact patterns, legal issues, and evidence that may be presented in the ensuing trials.[41]

Indeed, H.R. 339 is so intrusive that if enacted into law, it may well be found inconsistent with recent Supreme Court decisions interpreting the Congressional power to legislate under the

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[39] *Product Liability: Hearing on S. 565, The Product Liability Fairness Act of 1995 Before the Senate Comm. on Commerce, Science and Transportation*, 104th Cong., 6-7 (1995) (statement of Stanley Feldman of the Conference of Chief Justices, National Center for State Courts).

[40] *Preemption of Product Liability: Hearing on H.R. 10 Before the House Comm. on the Judiciary*, 104th Cong., (1995) (statement of the National Conference of State Legislatures).

[41] *Hearing on H.R. 339, The Personal Responsibility in Food Consumption Act of 2003 Before the Subcomm. on Commercial and Administrative Law, House Comm. on the Judiciary*, 108th Cong., 7 (2003) (statement of Professor John H. Banzhaf, III).

Commerce Clause. Four years ago in *United States v. Morrison*, the Court invalidated portions of the Violence Against Women Act, stating that Congress had overstepped its specific constitutional power to regulate interstate commerce.[42] Despite vast quantities of data illustrating the effects that violence against women has on interstate commerce, the Court essentially warned Congress not to extend its constitutional authority in order to, "completely obliterate the Constitution's distinction between national and local authority." The same concerns were brought in *United States v. Lopez*, which invalidated a federal law criminalizing the possession of firearms in a school zone. In that case, the Supreme Court cautioned Congress regarding its limited authority in matters traditionally left to the states, Congress's authority is not as broad.[43] This would be particularly true concerning matters of public health and safety of the nature implicated by H.R. 339.

IV. There are Far Preferable Ways to Deal with Legal Actions Involving the Food Industry

Although headlines of obesity lawsuits have been splashed across the newspapers as plaguing our legal system, the reality is very few, if any, suits are successful in court. Instead the legal system has ably handled the limited number of matters that have come before it.

While many of these cases have been deemed frivolous, others have resulted in positive changes in food industry policies. In fact, some of the cases have highlighted questionable measures taken by the industry that denied consumers information about the contents of certain foods, the foods' nutritional value, or the long-term consequence of the foods' consumption. Consider the following developments – which arguably stem in part from food product related litigation, such as the lawsuit brought against Kraft Foods regarding the dangerous trans fat found in Oreo Cookies.[44]

- Last year, the FDA issued requirements that food labels reveal the levels of trans fats. In doing so, the FDA estimated that merely revealing trans fat content on labels will save between 2,000 and 5,600 lives a year, as people either would choose healthier foods or manufacturers alter their recipes to leave out the damaging ingredient.[45]

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[42]529 U.S. 598 (2000).

[43]514 U.S. 549 (1995).

[44]*See Oreo Cookies Lawsuit Crumbles*, CBSNews.com, (May 15, 2003) *at* http://www.cbsnews.com/stories/2003/05/13/health/main553619.shtml.

[45]Lauran Neergaard, *FDA to force foods to reveal artery-clogging trans fat,* ASSOCIATED PRESS, July 9, 2003.

- McDonald's now offers a "Go Active Meal" for adult, containing a healthy salad along with exercise tools.[46] Burger King has joined the effort by creating low fat chicken baguettes for health conscious consumers, and Pizza Hut is offering the Fit 'N Delicious pizza that is only 150 calories per large pizza compared to the 450 calories in just one slice of its Stuffed Crust pizza.[47]

- Major food companies, such as McDonald's, Kellogg and PepsiCo have recently promised to change how they produce foods and to take health concerns into greater consideration. For instance, McDonald's and the Frito-Lay division of PepsiCo, plan to eliminate trans fats in their foods. The New York City public school system also banned candy, soda and other sugary snacks from school vending machines to combat obesity among schoolchildren.[48]

At the same time, when non-meritorious lawsuits are brought, our legal system has multiple procedural safeguards to ensure defendants' rights are respected. First, judges monitor filings at every step, and are empowered to dismiss a case that lacks merit at any time. As mentioned above, last year a federal judge dismissed with prejudice the obesity suit against McDonald's when it found the plaintiffs failed to prove any connection between their weight and McDonald's food.[49] This meant the defendant was able to avoid the expenses of a protracted trial.

Second, attorneys can be punished and subjected to monetary penalties if they bring frivolous cases to court, or otherwise abuse the legal process. Federal Rule of Civil Procedure 11 – which has counterparts in all 50 states – allows sanctions against litigants and their attorneys when they make bad-faith arguments or bring a suit for an improper purpose. Specifically, Rule 11 type procedures prohibit bringing a case "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."[50] The rule also requires that every legal argument be supported by existing law or a "nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."[51] If a defendant feels

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[46]Sherri Day, *McDonald's Enlists Trainer to Help Sell Its New Meal*, NY TIMES, Sept. 16, 2003 at C4 (describing a new pilot program in Indiana).

[47]Bruce Horovitz, *Pizza Hut to Serve UP Slices of Healthier Pie; Altered Fast-Food Favorite* Has Less Fat, USA TODAY, Oct. 15, 2003 at B1.

[48]David Barboza, *Kraft Plans to Rethink Some Products to Fight Obesity*, N. Y. TIMES, July 2, 2003 at C6.

[49]Pelman v. McDonalds Corp., No. 02 Civ. 7821(RWS) (S.D.N.Y. Sept. 3, 2003), at 11.

[50]FED. R. CIV. P. 11(b)(1).

[51]*Id.* at (b)(2). *See also* Rule 11(b)(3) which requires that "allegations and other factual contentions have evidentiary support."

that either of these requirements has been broken, it can simply move for sanctions–and if successful, can recover the expenses incurred as a result of the violation.[52]

Finally, the contingency fee system operates to prevent attorneys from taking baseless cases. Under this system, an attorney only gets paid if he or she wins, so there is little incentive to pursue cases that do not meet legal and evidentiary requirements. If plaintiffs continue to lose obesity cases, we would expect the attorney would hesitate to bring such actions in the future.

Conclusion

H.R. 339 is ill-conceived legislation. It is drafted so broadly it would insulate negligent and reckless activity, and would upset cases in the mid-stream of litigation. It has been drafted in the absence of a single verdict against the food industry, and would preempt the laws in all 50 states.

The common law system of tort law implemented by our States has served our citizens well for more than 200 years, and is more than able to handle those frivolous cases which do arise. We should not pass special interest legislation that panders to a single industry at the expense of our system of federalism.

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[52] *Id.* at (c)(2).